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JOANN BLACKBURN; Attorney for Appellant; ROBERT M. TAYLOR; Attorney for Respondent;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SYLVIA M. TORGERSON,

Plaintiff and Respondent,

vs.

TERRY L. TORGERSON,

Supreme Court No.
16814

Defendant and Appellant.

APPELLANT'S BRIEF

Appeal from a Decree of Divorce of the
Third Judicial District for Salt Lake County
Honorable Homer F. Wilkinson

JOANN BLACKBURN
JEROME H. MOONEY & JOANN BLACKBURN
356 South 300 East, Suite 3
Salt Lake City, Utah 84111
Attorney for Appellant

BRAD SWANER
SWANER & TAYLOR
722 Boston Building
Salt Lake City, Utah 84111

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Attorney for Appellant

BRAD SWANER
SWANER & TAYLOR
722 Boston Building
Salt Lake City, Utah 84111

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NATURE OF THE CASE

This is an appeal from a final Decree of Divorce, which awarded to Plaintiff a one-half (1/2) interest in Defendant's expected retirement benefits under the Railroad Retirement Act of 1974.

DISPOSITION IN LOWER COURT

On October 25, 1979, the Honorable Homer F. Wilkinson, Third District Court Judge, of Salt Lake County, State of Utah, awarded Plaintiff a Decree of Divorce. In his Findings of Fact, the judge found that, inter alia, the equities in the parties' house and lot was Forty Thousand Eight Hundred and Ten Dollars (\$40,810.00), and that Plaintiff should be awarded this property subject to a lien in favor of the Defendant in the amount of Sixteen Thousand One Hundred Sixty-six Dollars and 45/100, (\$16,166.45). The lien amount represents one-half (1/2) the equity in the property, less one-half (1/2) of the amount paid into the Railroad Retirement Fund by Defendant because of his employment during the course of the marriage. (R. 102)

RELIEF SOUGHT ON APPEAL

1. That this court find that the award to Plaintiff of an interest in Defendant's expected retirement benefits impermissibly conflicts with the Railroad Retirement Act of 1974 (45

USCS 231 et seq and rule that, that portion of the Decree is invalid and unenforceable, and that defendant's lien on the property should be increased by the amount of his retirement benefits which were awarded to the Plaintiff.

STATEMENT OF FACTS

After a hearing on the case, the trial court issued a Memorandum Decision on April 4, 1979 (R. 84-86), whereby it found that:

11. The Plaintiff is awarded one-half (1/2) of the amount paid into the Union Pacific Retirement Fund at the rate of \$116.00 per month from approximately July 1, 1965 being the approximate date of the marriage to the date of separation being April 1, 1978. The Plaintiff is to receive credit for this amount against Defendant's lien on the real property. (R. 85)

Defendant filed objections to this portion of the decision and a Motion for Review of Findings, challenging the calculations of the amounts actually paid into the retirement fund, (R. 87-88). Defendant argued that the sum of Eight Thousand Three Hundred Twenty-three Dollars and 67/100 (\$8,323.67) was the correct amount, and not Seventeen Thousand Eight Hundred and Sixty-four Dollars (\$17,864.00), as calculated pursuant to the Memorandum Decision.

In making the final Decree of Divorce and Findings of Fact and Conclusions of Law, the trial court agreed with Defendant's calculations. It granted defendant a lien in the amount of

Sixteen Thousand One Hundred Sixty-one Dollars and 83/100, (\$16,161.83) which amount represented one-half (1/2) of the equity, less Four Thousand One Hundred Sixty-one and 83/100 (\$4,161.83) which was one half (1/2) of Defendant's contribution into his Railroad Retirement Fund. (R. 102).

The Decree of Divorce and Findings of Fact and Conclusions of Law were signed on October 25, 1979 (R. 105 and 108) and entered on October 29, 1979 (R. 106).

Defendant filed his Notice of Appeal from these Findings and Decree of Divorce on November 21, 1979. (R. 110).

ARGUMENT

THE TRIAL COURT'S AWARD TO PLAINTIFF OF AN INTEREST IN DEFENDANT'S EXPECTED BENEFITS UNDER THE RAILROAD RETIREMENT ACT OF 1974 IMPERMISSIBLY CONFLICTS WITH THE ACT.

The recent United States Supreme Court case of Hisquierdo v. Hisquierdo, ___ U.S. ___, 59 L. Ed 2d 1, 99 S. Ct. _____ (1979) dealt specifically with the issue of an employee's retirement benefits under the Railroad Retirement Act of 1974 (45 USCS §231 et. seq.) and the award of any interest in such benefits to the employee's spouse in a divorce proceeding.

In Hisquierdo, supra, the California Supreme Court reversed a lower court ruling and held that in a suit for dissolution of a marriage, the wife should be awarded an interest in the husband's expectation of receiving benefits under the Railroad Retirement

Act of 1974. The United States Supreme Court reversed this ruling, holding that such an award would do major damage to a clear and substantial federal interest and therefore, under the Supremacy Clause of the United States Consitution (Art VI, cl 2) such an award impermissibly conflicts with the Act.

In reaching its conclusion, the court reasoned that both the language and the purpose of the Act, indicate that Congress intended that the benefits for the employee spouse alone. Any order that the husband had to pay the wife a portion of the benefit as he received it, or any offsetting award to the wife of present property to compensate her for her interest in her husband's expected benefits, would violate the direct language of the Act and frustrate the statutory policy of providing economic security for the employee and encouraging early retirement.

The court relied heavily upon the following section of the Railroad Retirement Act:

"Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . ." 45 USC §231m

The wife in Hisquierdo, supra, proposed two methods whereby she could benefit from her husband's retirement fund. The first was that the court should retain jurisdiction and order the petitioner to pay her an appropriate portion of his benefits, or its

monetary equivalent, as he received it. The Supreme Court rejected this position as running contrary to the language and purpose of §231m, quoted above, and as also being directly in conflict with the following provision of the Act:

"The entitlement of a spouse of an individual to an annuity . . . shall end on the last day of the month preceding the month in which . . . the spouse and the individual are absolutely divorced." 45 USCS §231d (c)(3)

Secondly, the wife proposed that she should receive the house, free of any interest of the husband, as an offsetting award of the presently available community property, to compensate her for her interest in petitioner's expected benefits. Such an offsetting award was made in the instant case by the trial court, when it reduced the amount of appellant's lien on the home by one-half (1/2) of his expected retirement benefits.

However, the Supreme Court in Hisquierdo, supra, rejected this proposal also. 59 L. Ed 2d 1, 15. It found the scheme to directly conflict with the language of §231m which specifically provides that the benefits shall not be "anticipated," and such an award would improperly anticipate payments by allowing the wife to receive her interest before any interest had accrued.

Furthermore, such an award might cause greater harm to the statutory scheme and the employee, than would a regular deduction from his benefit check, if certain contingencies occurred. For example, if the employee died before collecting any benefits,

his heirs would suffer to the extent that the offset exceeded the lump sum death benefits under the Act. Or if he left the industry before retirement and failed to meet the requirement for certain supplemental benefits, he would never fully regain the amount of the offset. And finally, there is the possibility that Congress could alter the terms of the Act, by reducing .. benefits.

The trial court in the present case impermissibly "anticipated" appellant's payment of benefits by offsetting one-half (1/2) of those benefits against the parties' equity in the home. The Supreme Court in Hisquierdo, supra, flatly rejected such an award. It stated:

"Section 321m goes far beyond garnishment. It states that the annuity shall not be subject to any 'legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.' Its terms make no exception for a spouse." 59 L. Ed 2d 1, 14

WHEREFORE IT IS RESPECTFULLY SUBMITTED that this court find the offsetting award by the Third Judicial Court for Salt Lake County, impermissibly conflicts with the Railroad Retirement Act of 1974, for the reasons set forth in Hisquierdo, supra, and hold that portion of the Divorce Decree to be unenforceable and of no effect, and order that defendant's lien on the property should be increased by the amount of his retirement benefits which were awarded to Plaintiff.

Respectfully Submitted,
JEROME MOONEY & JOANN BLACKBURN

By Joann Blackburn
JOANN BLACKBURN
356 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 364-5635
Attorneys for Defendant and
Appellant, Terry Torgerson

HAND DELIVERY CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Brief was hand delivered to the office of Brad L. Swaner, Swaner & Taylor, 722 Boston Building, Salt Lake City, Utah 84111 on this 1st day of February, 1980

Joann Blackburn